

MULTIMEDIA



UNIVERSITY

STUDENT ID NO

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MULTIMEDIA UNIVERSITY FINAL EXAMINATION TRIMESTER 2, 2019/2020

ULV4622 -LAW OF EVIDENCE II (All Sections / Groups)

10 March 2020

Reading Time: 9.00am -9.15am (15 Minutes)

Answering Time: 9.15am – 12.15pm (3 Hours)

INSTRUCTIONS TO STUDENT:

1. Students will have **fifteen minutes** during which they may read the paper and make rough notes ONLY in their question paper. Students then have the remaining **THREE HOURS** in which to answer the questions.
2. This Question paper consists of 11 pages and is divided into 2 parts (**Part A** and **Part B**). There are 2 questions in Part A and 3 questions in Part B.
3. Students are required to answer only **1 question in Part A** (answer either **Q1A** or **Q1B**) and answer **ALL 3 questions in Part B**. All questions carry equal marks and the distribution of the marks for each question is given.
4. Students are allowed to bring into the Examination Hall only a CLEAN and ORIGINAL copy of the:
 - i. EVIDENCE ACT 1950
 - ii. EVIDENCE OF CHILD WITNESS ACT 2007(Optional/ Annexed to this Question paper); and
 - iii. CRIMINAL PROCEDURE CODE

(Students are not allowed to lend or borrow statute(s) during the Examination. “Clean” is defined to include no tagging, no annotation either by the publisher or anyone else, and no erased marking. Highlighting and underlining are also prohibited.)
5. Please write all your answers in the Answer Booklet provided.

PART (A)

Answer only 1 question in Part A. Answer either Question1(A) or Question 1(B).

QUESTION 1 (A)

Jedi has agreed to sell his car to Ben for the amount of RM50,000.00. Both of them signed a simple agreement on 1 November 2019 that only contains the following terms:

*I, Jedi agree to sell my car to Ben for the amount of RM50,000.00.
I have also received a sum of RM10,000.00 from Ben as an initial
payment. The balance sum to be paid at later date.*

Before they put the above terms in writing, Ben informed Jedi that he needs to secure a loan to pay the balance sum and the whole process to secure the loan might take a maximum period of up to two months. Jedi raised no objection about the matter. On 1 December 2019, Jedi informed Ben that he wanted to cancel the contract because of Ben's failure to pay the balance sum. On 7 December 2019, Ben's application for loan was approved by Bank XYZ. Ben has initiated a legal action against Jedi and applies to the court for a specific performance order to compel Jedi to perform the contract.

Assess the admissibility of the following evidence and advise Ben accordingly:

- (a) the oral agreement that gives Ben the maximum period of two months to secure the loan in order to pay the balance sum.

(12 ½ marks)

- (b) Ben wishes to tender the agreement to show that it contains a provision that the balance sum can be paid at later date. However, he only has the copy of the agreement. The original agreement is kept by Jedi.

(12 ½ marks)

(Total: 25 marks)

Continued...

QUESTION 1(B)

Mike was charged with two separate offences under the Dangerous Drugs Act 1952. The first charge was for the possession of 30.40 grams of cannabis under s. 6 of the Dangerous Drugs Act 1952 and the second charge was for trafficking 993.8 grams of cannabis, an offence under s. 39B(1) (a) of the Dangerous Drugs Act 1952. Mike pleaded not guilty and claimed trial for both offences which were tried separately. The prosecution's case was that on 2.12.2018, around 10.00 pm, Inspector Gadget (PW1) together with his team of officers took up an ambush position at the road side and saw the accused approaching on a motorcycle. As a result of a body search carried out on Mike, Inspector Gadget found a small black pouch from his right jeans pocket and upon further examination, five plastic packets which contained dried plant materials, later confirmed as cannabis, were found. This formed the subject of the first charge under s. 6 of the Dangerous Drugs Act 1952 for possession of 30.40 grams of cannabis against Mike which is still pending. As for the second charge, the prosecution's case was that, upon interrogation, Mike led Inspector Gadget and his men to a house in Kampung Parit Seberang where he entered into a room and pointed to a cupboard. He then took out a block of dried plant material wrapped in a transparent plastic from the cupboard and handed it over to Inspector Gadget. It was later confirmed that the said material was cannabis and was the subject of the second charge for trafficking 993.8 grams of cannabis under s. 39(B).

During the trial for the second charge under s. 39(B) the prosecution called Inspector Gadget as a witness and he stated as follows in his evidence in chief, "*On 2.12.2018, around 10.00 pm the accused was stopped and searched at a road block. During the body search I found a small black pouch from the accused's right jeans pocket and upon further examination, five plastic packets which contained dried plant materials, later confirmed as cannabis, were found. He later led the team to a house in Kampung Parit Seberang, entered a room, took out a block of dried plant material and handed it to me. I then seized and secured this material as evidence*". Defence counsel did not object to this evidence which was admitted by the trial judge. At the end of the prosecution's case the trial judge ruled that a prima facie case had been established and ordered Mike to enter his defence. Mike elected to give sworn evidence in his own defence and during his evidence in chief stated as follows, "*I did not enter the room where the material was found. I did not hand anything to Inspector Gadget in the house. The police ransacked the whole room and found drugs in the cupboard on their own. I have no knowledge about the drugs in the room. My uncle Jack also has access to the room. Inspector Gadget is not telling the truth.*". During Mike's cross examination, it was put to him that he has several previous convictions for drug related offences and a pending charge for possession. The defence counsel had objected to this cross examination. The trial judge overruled the objection. At the end of the trial, the judge convicted Mike for the charge under s. 39(B) of the Dangerous Drugs Act 1952. Mike now wishes to appeal against his conviction.

Assess whether Mike would be successful in his appeal.

(Total: 25 marks)
Continued...

PART (B)**Answer all 3 questions in Part (B)****QUESTION 2**

“On this, we refer to what was said by the Federal Court in *Husdi v. PP [1980] 1 LNS 29; [1980] MLJ 80* at p. 82:

We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the Court - because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify - let alone - arrest the offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.

Thus, regardless of the absence of any averments by the respondent in the affidavits as to the possibility of witness tampering, the risk is substantive and real. Further, it is not in the public interest if statements taken from witnesses and documents obtained during the course of police investigations be furnished to the appellant. Section 124 of the Evidence Act 1950 provides that a public officer cannot be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by such disclosure.”

(Per Zabariah Mohd Yusof JCA in *Dato' Sri Mohd Najib Hj Abdul Razak v Public Prosecutor [2019] 5 CLJ 23, CA*)

Explain the above statement with reference to relevant statutory provisions and decided cases.

(Total: 25 marks)

Continued...

QUESTION 3

Answer BOTH parts of this question.

- (a) "The competency of an expert is a preliminary question and is one upon which, in practice, considerable laxity prevails"
(per Abdooolcader FJ in *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at page 278 (FC))

Assess the above statement in relation to the admissibility of opinions of experts in Malaysia.

(12 ½ marks)

- (b) Samad has been charged under s 41(1) of the Road Transport Act 1987 for reckless driving that caused the death of a victim in a car accident that took place at the North-South Expressway, near Seremban. The accident happened on the eve of Hari Raya Aidilfitri. In order to show that Samad was driving recklessly, the prosecution wishes to prove that at the time of the accident, the North-South Expressway, near Seremban was busy with traffic.

Advise the prosecution on how it can prove that at the time of the accident the North-South Expressway was busy with traffic.

(12 ½ marks)

(Total: 25 marks)

QUESTION 4

The accused Alice was charged with the murder of BB, a three-year-old child who was in her care at a nursery. Alice is the sole proprietor and principal of 'Mentari Nursery Playschool'. BB had been enrolled at the nursery for four months together with his older sister Paris when Alice brought him to the emergency unit of the Muar Hospital in an unconscious state on 2 April 2019. BB died later that day without regaining consciousness. Following a post mortem, the cause of death was found to be "Blunt Trauma to the Head". Alice denies the murder charge and claims that BB had accidentally knocked his head on a table while playing with his sister. The prosecution alleges that it was Alice who had caused the head trauma to BB.

Continued...

The prosecution proposes to adduce the following evidence during trial in support of its case:

(a) testimony from Paris, BB's six-year-old sister who was also enrolled in the same nursery school. Paris's testimony will be adduced in the form of a video recording of her police interview about the events which led to BB's death. The police interview was conducted in Mandarin by Inspector Lim on 15 April 2019. In the interview Paris stated that she saw Alice beating BB;

(15 marks)

(b) evidence that a police report and several complaints to the *Jabatan Kebajikan Masyarakat* (Department of Social Welfare) have been made against Alice in 2015 by parents raising child abuse concerns.

(10 marks)

Analyse the evidential issues and advise the defence accordingly on the admissibility of the above evidence.

(Total: 25 marks)

End of Questions

ANNEXURE

EVIDENCE OF CHILD WITNESS ACT 2007

ACT 676 Preamble

An Act to make provisions relating to the giving of evidence by child witnesses, and for other matters connected therewith.

ENACTED by the Parliament of Malaysia as follows:

Continued...

PART I PRELIMINARY**Section 1: Short title and commencement**

- (1) This Act may be cited as the Evidence of Child Witness Act 2007.
- (2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette.

Section 2: Interpretation

In this Act, unless the context otherwise requires-

"Court" means the High Court, the Sessions Court, the Magistrates' Court and the Court For Children;

"Minister" means the Minister charged with the responsibility for law;

"medical officer" means a registered medical practitioner in the public service and includes a registered medical practitioner in any teaching hospital of a university established under the Universities and University Colleges Act 1971 [Act 30];

"police officer" has the meaning assigned to it in the Police Act 1967 [Act 344];

"video recording", in relation to a child witness, means a video recording of the oral evidence of the child witness, in the form of an interview conducted between a police officer and the child witness, expressed upon any format, made with a view to its admission as evidence of examination-in-chief of the child witness;

"live link" means a live television link or other arrangement whereby a child witness, while being absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person in such courtroom or other place and to be seen and heard by the persons specified in paragraphs 4(2)(a) to (d);

"child witness" means a person under the age of sixteen years who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence.

PART II MANNER OF GIVING EVIDENCE BY CHILD WITNESS**Section 3: How evidence of child witness may be given**

- (1) A child witness may, at any stage of a trial, give evidence in any one or a combination of the following manner:
- by having a screen between him and the accused or a child charged with any offence;
 - by live link; or
 - by video recording.

Continued...

(2) For the purposes of this section, any evidence given under subsection (1) shall be deemed to be evidence given in an open Court.

Section 4: Screening

(1) A child witness, while giving evidence in the Court, may be prevented by means of a screen or other arrangement from seeing and being seen by the accused or a child charged with any offence.

(2) The screen or other arrangement shall not prevent the child witness from being able to see, and to be seen by-

- (a) the Court;
- (b) the prosecutor;
- (c) the advocate for the accused or the child charged with any offence; and
- (d) the interpreter.

(3) Where two or more advocates are acting for the accused or the child charged with any offence, the requirement of paragraph (2)(c) is satisfied if the child witness is able at all material times to see and be seen by at least one of them.

Section 5: Evidence by live link

(1) Where a child witness gives evidence by means of a live link from a location other than the courtroom, that location is deemed to be part of the courtroom in which the proceeding is being held for the purposes of this section.

(2) The Court may make an order specifying-

- (a) that a member of the Court staff be present at that location;
- (b) the interpreter for the proceedings;
- (c) any adult permitted by the Court to accompany the child witness;
- (d) the persons in the courtroom who must not be heard, or seen and heard, by the child witness and by the persons accompanying the child witness;
- (e) the persons in the courtroom who must be able to see and hear the child witness and the persons accompanying the child witness;
- (f) the method of operation of the live link system including compliance with such minimum technical standards as may be determined by the Chief Justice of the Federal Court; and
- (g) any other matter as the Court considers necessary in the interest of justice.

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Section 6: Video recording of a child witness

(1) Where a video recording of a child witness is given in evidence, such video recording shall be admitted as evidence of examination-in-chief of the child witness: Provided that the contents of the video recording shall be subject to the Evidence Act 1950 [Act 56].

(2) A video recording under subsection (1) shall not be admitted unless-

- (a) accompanied by a transcript of the original language used in the video recording; and
- (b) accompanied by a translation of the transcript, if the language used in the video recording is other than the national language.

(3) A certificate by a person who did the video recording pursuant to subsection (1) shall, until the contrary is proven, be admitted as a *prima facie* evidence of the authenticity of the content of the video recording.

(4) Where a video recording is admitted under this section, the child witness shall be called to be further examined-in-chief by the party who tendered the video recording in evidence on any matter which, in the opinion of such party, has not been dealt with adequately in the child witness's recorded testimony.

(5) Notwithstanding any provision of this Act, where a child witness is called to be further examined-in-chief under subsection (4), he may give evidence by means of having a screen between him and the accused or child charged with any offence or by means of a live link.

(6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed in the recording shall be treated as if given by that child witness in direct oral evidence.

(7) In the case of a child witness who has been sworn, the Court shall admit the statement made by the child witness in the video recording as sworn evidence.

(8) In the case of evidence of a child witness of tender years, the Court, when considering the statement in the video recording as evidence shall assess and form an opinion as to whether the child witness possesses sufficient intelligence and understands the duty of speaking the truth, though not given upon oath.

Section 7: Previous video recording of a child witness may be proved

When a child witness attains the age of sixteen years before giving evidence in the Court, any previous video recording of evidence given by the child witness, made pursuant to section 6, may be proved.

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Section 8: Examination of child witness through intermediary

- (1) Any examination of a child witness may be conducted through the Court or an interpreter or any other person authorized by the Court, acting as an intermediary, for the purposes of this section.
- (2) The function of an intermediary is to communicate-
 - (a) to the child witness, questions put to the child witness; and
 - (b) to any person asking such questions, the answers given by the child witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the child witness.
- (3) An intermediary shall not-
 - (a) prompt the child witness to answer any question;
 - (b) influence the answers of the child witness; or
 - (c) disrupt the questioning of the child witness.
- (4) An unrepresented accused shall not be entitled to question a child witness directly but may do so through an intermediary.

Section 9: Adults accompanying child witness

- (1) The Court may allow a child witness to be accompanied by an adult while giving evidence in any proceedings.
- (2) The Court may permit more than one adult to accompany the child witness if the Court considers it in the interests of justice to do so.
- (3) An adult accompanying the child witness shall not-
 - (a) prompt the child witness to answer any question;
 - (b) influence the answers of the child witness; or
 - (c) disrupt the questioning of the child witness.

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Section 10: Formal attire may be dispensed with

The Court may direct that the wearing of coats, jackets, gowns or other formal attire of a judge and Court officers to be dispensed with during the giving of evidence by a child witness.

Section 11: Presumption as to age of child witness

(1) If the Court is in doubt as to the exact age of a child witness, a certificate of a medical officer to the effect that, in his opinion, the child witness has or has not attained a specified age may be given in evidence, and the Court shall declare the age of that child witness for the purposes of this Act.

(2) The age of a child witness as declared by the Court under subsection (1) shall be deemed to be the true age of that child witness, unless and until the contrary is proved.

Section 12: Child witness suffering from a disability

(1) A child witness who is suffering from any disability may, apart from giving his evidence in any manner prescribed in subsection 3(1) or a combination of the manner as prescribed in that subsection, give his evidence in any other manner in which he can make it intelligible.

(2) The evidence so given shall be deemed to be oral evidence.

(3) In this section, "disability" includes activity limitation resulting from physical, intellectual or sensory impairment, medical conditions or mental illness which may be permanent or temporary in nature.

Section 13: Child witness attaining age of sixteen years while giving evidence during trial

When a child witness is giving evidence before the Court and in the course of giving evidence he attains the age of sixteen years, the Court shall continue to hear the evidence of that child witness and exercise all the powers under this Act.

Section 14: Restrictions on media reporting and publication

(1) No person shall reveal or publish any particulars in any mass-media or transmit through any electronic medium that may lead to the identification of a child witness, in particular the name and address of the child witness, and the name and other particulars of the educational institution he attends.

Continued...

- (2) A picture of the child witness or any other person, place or thing which may lead to the identification of the child witness in the proceedings mentioned in subsection (1) shall not be published in any mass-media or transmit through any electronic medium.
- (3) Any person who contravenes subsection (1) or (2) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

PART III GENERAL

Section 15: Regulations

- (1) The Minister may make such regulations as are necessary or expedient to give full effect to or for carrying out the provisions of this Act.
- (2) Without prejudice to the generality of subsection (1), regulations may be made-
- (a) to prescribe the procedures to be used for any of the purposes of this Act; and
 - (b) to provide for the management and administration of facilities to be given to child witnesses.

Section 16: Application of Evidence Act 1950 and Criminal Procedure Code

The provisions of the Evidence Act 1950 and the Criminal Procedure Code [Act 593] shall continue to apply except in so far as those provisions are expressly modified by this Act.

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